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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 257

JAY C. HORMEL,

Petitioner,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. C. ALDERSON,
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Of Counsel.

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No. 257

JAY C. HORMEL,

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Statement of Matters Involved.

This case involves the legality of including income of three irrevocable trusts created by petitioner in 1934, under Section 22 (a) of the Revenue Act of 1934, in petitioner's income for federal income tax purposes.

II.

Jurisdiction.

The judgment (decree) of the Circuit Court of Appeals for the Eighth Circuit was entered April 25, 1940 (R. 50-51). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the act of February 13, 1925.

III.

Questions Presented.

The petitioner, in 1934, declared himself and another, co-trustees of certain property to pay the net income therefrom to Germaine D. Hormel as guardian of a minor son of petitioner, the trust to terminate at the expiration of three years or upon the earlier death of taxpayer or the minor child named, whereupon the corpus was to be restored to the grantor or his estate. There were created three trusts, one for each child, each alike in amount and terms. The question is: Was the net income of the trusts for the years of 1934 and 1935 properly included in the taxpayer's gross income?

IV.

Statute and Regulations Involved.

The statute and regulations involved will be found in the appendix, *infra*, page 24.

V.

Summary Statement of the Facts Involved.

Petitioner, a resident of Minnesota (hereinafter referred to as the taxpayer), created three irrevocable trusts on July 16, 1934 (R. 30-37), for the benefit of his three minor sons. He named himself and another who accepted said

trust (as co-trustees) and conveyed stock of Geo. A. Hormel & Company to said co-trustees. It was provided therein that the co-trustees should receive and hold said securities and collect dividends in trust for Germaine D. Hormel as guardian of the named sons (R. 30). The dividends of each trust up to $2,000.00 a year shall be paid to the guardian "for the use and benefit of" her ward and the excess, if any, to be paid to taxpayer. The co-trustees have power to appoint proxies to vote the stock held in trust and to exercise voting powers (R. 30). Upon the termination of the trust, the corpus or principal was to belong to taxpayer, or in case of his death, to his heirs or persons named in his will. The co-trustees were not liable except for willful or deliberate violation of duties. No title or income vested in the guardian or minor ward and no principal or income was chargeable for their debts (R. 31). They were prohibited from selling or encumbering any interest in the trust estate or any dividends therefrom prior to actual receipt. The trust terminates at the end of three years from date or upon the earlier death of taxpayer or son named in the trust. At no time before the termination date, the taxpayer or co-trustees have the power to revest in taxpayer any part of the corpus or income other than therein provided (R. 31). It should be noted in passing that under the terms of the trusts, the co-trustees had no power to sell, no power to reinvest, no power to compromise, no power to hold property in their own individual names, and that all the powers mentioned therein were in the co-trustees.

In the years of 1934 and 1935, all income of the trusts was paid to Germaine D. Hormel as guardian in accordance with the terms and were included in her returns as such (R. 29). Taxpayer had substantial income during said years and did not include said trust income from the three trusts which was paid to the guardian (R. 11). The re-

spondent (hereinafter referred to as the Commissioner) included said dividends in petitioner's gross income and assessed a deficiency, basing his action solely upon paragraph 166 of the Revenue Act of 1934 (26 U. S. C., paragraph 166, 48 Stat. (680, 729), (R. 10). Taxpayer appealed to the Board of Tax Appeals and in proceedings before the Board a stipulation was entered into, containing, among other things, a statement as follows: "For income tax purposes the sole question involved for the Board to decide is whether any or all the items of income set forth in paragraph 7 of this stipulation are taxable to petitioner as determined by the respondent" (R. 29). The Commissioner, in the hearing before the Board, relied solely upon Sections 166 and 167 of the Revenue Act of 1934 (R. 44). The Board entered an order on March 28, 1939, determining that neither of the sections were applicable and determining that there was no deficiency (R. 13-22). Commissioner, in his petition for review to the Circuit Court of Appeals, assigned as error: (1) The ruling of the Board that the income of the three trusts was not taxable to the grantor; and (2) failure of the Board to hold that income was taxable to taxpayer under either 166 or 167 (R. 25). In his subsequent brief in support of the petition, the Commissioner, under Points and Authorities, argued that the taxpayer did not give up sufficient interest in the trust income or the trust corpus to avoid taxation under Sections 166, 167 and/or 22 (a) of the Revenue Act of 1934, and further that the taxpayer retained sufficient interest in the income and corpus to justify taxing him under Sections 166, 167 and/or 22 (a), considered together and read as a whole (R. 45). Taxpayer, in his supplemental brief, asserted that since Commissioner had not contended before the Board that under 22 (a), the trust income from the three trusts in suit was taxable to taxpayer and had not expressly men-

tioned that section in his assignments of error in petitioning for review nor referred to it in his specification of errors in the brief in the Court, the only matters before the Court for review were Sections 166 and 167 (R. 47). Commissioner, in answering brief, abandoned his contention that 166 was applicable and asserted that the income from the trusts was, for purposes of taxation, the income of taxpayer under 22 (a) and 167 (R. 47), and that the Court was not precluded from considering the applicability of 22 (a). The Circuit Court of Appeals found that the Board was right in deciding that Paragraph 167 was not applicable to the trusts (R. 47). The Court found, however, on authority of *Helvering* v. *Clifford* (it was decided on Section 22 (a)) that the income of the trusts was income of the taxpayer and the decision of the Board was reversed upon authority of *Helvering* v. *Clifford* (R. 50) stating, however, "that the question of the right of this Court to reverse the Board, which decided correctly the only questions expressly presented to it, is not free from doubt" (R. 48).

VI.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In not limiting the issues in the case before the Circuit Court to the questions presented to the Board of Tax Appeals.

2. In reversing the Board of Tax Appeals which decided correctly the only questions expressly presented to it.

3. In allowing questions of law not presented or passed upon before the Board, to be raised. (In particular, allowing the consideration of Section 22 (a) of the Revenue Act of 1934.)

4. In holding the trust income here involved was taxable to petitioner under Section 22 (a) of the Revenue Act of 1934.

5. In holding that the trust income here involved was taxable to petitioner under the decision of *Helvering* v. *Clifford,* 309 U. S. 331, 60 S. Ct. 554.

6. In holding that there were no controlling distinctions between the short term family trusts here and the trust involved in the case of *Helvering* v. *Clifford, supra.*

7. In holding "the question of the taxability to the taxpayer of the income of these trusts was, in a broad sense, before the Board".

8. In holding the Commissioner was right in determining a deficiency although the reason given by him was wrong.

9. In holding taxpayer taxable on the income here involved under Section 22 (a) of the Revenue Act of 1934, in that said section, or any other section, taxing the income of the trusts here to petitioner would be such power of taxation that its constitutionality would be doubtful, being in violation of the due process clause of the United States Constitution, Article of Amendment No. V (U. S. C. A. Constitution, Part 1, page 39).

10. In reversing the decision of the Board of Tax Appeals.

VII.

Reasons Relied on for the Allowance of the Writ.

1. The decision of said Circuit Court of Appeals reversing the Board of Tax Appeals, which correctly decided the only questions expressly presented to it, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Helvering* v. *Achelis,* decided June 24, 1940.

2. The decision of said Circuit Court of Appeals as to the right of the Circuit Court to reverse the Board of Tax Appeals upon a point not raised before it, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit, on the same matter in the case of *Helvering* v. *Achelis,* decided June 24, 1940, Calendar No. 28, Docket No. 16598, and is further in conflict with the case of *Rhodes* v. *Commissioner* in the United States Circuit Court of Appeals, Fourth Circuit, 111 F. (2d) page 53.

3. The decision of said Circuit Court of Appeals granting an appellant the right to raise an issue for the first time in an appellate court for the purpose of reversing an adverse decision is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in a similar matter in the case of *Rhodes* v. *Commissioner,* 111 F. (2d) 53.

4. The decision of the Circuit Court of Appeals granting an appellant the right to raise an issue for the first time in an appellate court for the purpose of reversing an adverse decision and in reversing the Board of Tax Appeals, which has already decided correctly the only questions expressly presented to it, and reversing the Board of Tax Appeals upon a point not raised before it, is in conflict with the decisions of the United States Supreme Court on the same or similar matters in the case of *Helvering* v. *Wood,* 309 U. S. 344, 60 S. Ct. 551; and *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206.

5. The decision of the Circuit Court of Appeals to the effect that the taxpayer here reserved all, or practically all, of the substantial benefits by holding taxpayer liable thereon; is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court.

6. The Circuit Court of Appeals, in deciding that petitioner is taxable on income of the trusts created by him and

distributed to the beneficiaries, has decided that, although property has been irrevocably assigned to the trustee and the assignor has irrevocably relinquished the right to demand the income thereof and control after its receipt, and that the assignor is taxable on the income arising after said transfer and has thus rendered a decision in conflict with the decisions of other Circuit Court of Appeals on the same matter, and in conflict with applicable decisions of this Court.

7. If it be held that petitioner reserved practically all of the substantial benefits as owner under said Section 22 (a), then the question is raised as to the constitutionality of said Section 22 (a) in that it is doubtful if said Section 22 (a) is constitutional to that extent under the rule of *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206.

WHEREFORE, Your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its Docket No. 11565, Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *v.* Jay C. Hormel, Respondent, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated July 17, 1940.

JAY C. HORMEL,
By R. C. ALDERSON,
Counsel for Petitioner.

Of Counsel:
S. D. CATHERWOOD,
CATHERWOOD, HUGHES & ALDERSON.

Addenda.

We wish further at this time to call the court's attention to the fact that we wish to cite the case of *Commissioner* v. *Richter,* decided July 17, 1940, in the Third Circuit Court of Appeals, No. 7418, in support of the first four reasons relied on for the allowance of the writ, said reasons being set forth at pages 6 and 7 of the petition.

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No. 257

JAY C. HORMEL,

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vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 13-22) is reported in 39 B. T. A. 244. The opinion of the Circuit Court of Appeals (R. 42-50) is reported in 111 F. (2d) 1.

II.

Jurisdiction.

See petition for certiorari above, page 2.

III.

Specification of Errors.

See petition for certiorari above, page 5.

IV.

Summary of Argument.

Petitioner contends:

(a) The Circuit Court was without authority to reverse the Board, which decided correctly the only questions of law presented to it and was without authority to consider questions of law not presented or passed upon below and not set forth in assignments of error in the petition for review. It was without authority to consider Section 22 (a) of the Revenue Act of 1934 or any other provisions than the provisions 166 and/or 167 of the Revenue Act of 1934, as set forth in the petition for review before the Circuit Court of Appeals.

(b) That in any case, neither 22 (a) nor any other provision of the 1934 Revenue Act justifies the tax of the income herein mentioned to the petitioner under the rule of *Helvering* v. *Clifford* or otherwise.

(c) In event taxpayer is held to be subject to taxation under Section 22 (a), such a finding would be an unconstitutional construction to place on the law, it being in violation of due process to tax income to taxpayer he may not receive.

V.

ARGUMENT.

POINT I.

The Circuit Court was without authority to consider Section 22 (a) of the Revenue Act of 1934 and to reverse the Board thereon.

At no stage in the proceeding prior to his brief in the Circuit Court in support of his petition for review did the Commissioner take any position to the effect that the income was taxable to respondent under any provision of the Revenue Act of 1934, other than Section 166 or 167. In his notice of deficiency, Commissioner stated that the dividends or the income that he proposed to tax as income of taxpayer were to be taxed for the reason that, citing Section 166:

> "In view of the above, it is the opinion of this office that, since you, the grantor, may revest title to the corpus of the trusts in yourself if you survive your wife, and at the end of three years with respect to the trusts for the three sons, they are revocable trusts under section 166 of the Revenue Act of 1934 and article 166-1 of Regulations 86 as amended by Treasury Decision 4629, and the income therefrom is taxable to you" (R. 10).

and further stated:

> "* * * the Revenue Act contemplates taxing the income to the grantor if, by the express terms of the trust instrument, title to the corpus will certainly revest in the grantor at the end of a comparatively short period" (R. 8).

Section 166 is the section dealing with taxation of income from revocable trusts. Before the Board of Tax Appeals, Commissioner relied solely upon Sections 166 and 167, and

the Board based its decision on Sections 166 and 167 (R. 13 and 20-22). Commissioner in his petition for review of the decision of the Board of Tax Appeals, based his assignments of error solely on the grounds of Sections 166 and 167 (R. 25). For the first time does he inject a new point, contending taxpayer is subject to tax under 22. (a) in his brief in support of the petition for review to the Circuit Court (R. 45). Taxpayer, by supplemental brief, contended that since Commissioner had not contended before the Board for the taxation of the trust income under 22 (a) and had not expressly mentioned that section in his assignments of error in petitioning for a review, or expressly referred to it in his specification of errors in the brief in the court, the court was limited to the questions of the taxability of said income under 166 and 167 as that was the question that was before the court for review (R. 47). The Circuit Court found adversely to the taxpayer. This Court does not favor injection of a new point at this stage of litigation. *Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481; *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Wood*, 309 U. S. 344. The Circuit Court held:

> "The decision of the Board, however, cannot be sustained, in view of *Helvering* v. *Clifford, supra,* if we are at liberty to consider ¶ 22 (a). There are, we think, no controlling distinctions between the short-term family trusts here in suit and the trust which was involved in that case. The question of the right of this Court to reverse the Board, which decided correctly the only questions expressly presented to it, is not free from doubt" (R. 47).

It is very evident that the court did not feel clear on this matter, especially in view of their statement that it "is not free from doubt". This being especially true where the Board decided correctly the *only questions* expressly presented to it. This decision is directly in conflict with the

more recent decision of *Helvering* v. *Achelis,* Circuit Court of Appeals, Second Circuit, decided June 24, 1940 (no record), which decision involved taxability of income of a short term trust and where the Commissioner taxed the income under Section 166 and the Board expunged the deficiency and the Commissioner appealed to the court. The court held, refusing to consider Section 22 (a), and citing *Helvering* v. *Wood,* 309 U. S. 344; *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 206; *Helvering* v. *Salvage,* 297 U. S. 106, 109; *Rhodes* v. *Commissioner,* 111 F. (2d) 53: "Until otherwise advised, we shall assume they are right and that the point relied upon is not before us." In the case of *Rhodes* v. *Commissioner,* 111 F. (2d) 53, the question of the status of an issue raised for the first time before an appellate court was brought up, and the court stated, citing *General Utilities* v. *Helvering, supra; Helvering* v. *Salvage, supra;* and *Helvering* v. *Wood, supra:* "The authorities cited above seem clearly and positively to enunciate the rule that an appellant may not raise an issue for the first time in an appellate court for the purpose of reversing an adverse decision of the Board of Tax Appeals."

In further support of the contention that Commissioner was limited in pressing his claim before the Circuit Court of Appeals, to Sections 166 and 167, we call the Court's special attention to the stipulation (R. 29), which provided that: "For income tax purposes the sole question involved for the Board to decide is whether any or all the items of income set forth in paragraph 7 of this stipulation are taxable to petitioner as determined by the respondent." (Respondent was Commissioner before the Board.) It is the contention of the taxpayer here that the phrase "as determined by the respondent", taken in conjunction with the remainder of the paragraph, meant "in the same or like manner heretofore decided by the Commissioner". We

refer to *Hoeper* v. *Wells, Fargo & Co.*, 27 Cal. 11, 30, 85 Am. Dec. 211, where it is stated:

> "The word 'as' is defined in the last edition of Webster's Dictionary as follows: 'Like; similar to; of the same kind; in the same manner; in the manner in which.' This is obviously the ordinary import of the word in a bill of lading restricting the carrier's liability 'except as forwarder.' The carrier's liability was to be 'similar to that of forwarders,' or 'of the same kind.' They were liable in the same manner, or in the manner in which forwarders are liable."

There are innumerable decisions which define the word "as" as meaning "in the same or like manner" and quotations may be found in *Words and Phrases, Permanent Edition, Vol. 4, page 288.* The word "determined" has been defined in Webster's Dictionary as "decided" and indicates (heretofore decided) as put in the stipulation here and the basis upon which this case was tried entirely, as the Commissioner had heretofore decided it; otherwise it could not mean anything, if the Commissioner could constantly, from day to day, change his position and opinion, taxpayer would never know what issue he would be called upon to meet. The phrase "as provided by the laws" has been held to refer to laws already in existence, unless intention is expressed otherwise in the instrument. *In re Wilson's Estate,* 225 Pacific 283, 65 Cal. Appeals 680.

Surely, in view of the stipulation, any facts before the court could only be considered in the light of the Commissioner's deficiency notice (R. 5-12) and could not be generally held to be before the Board in a broad sense as set forth in the Circuit Court's decision (R. 49).

There are numerous fact questions that might be brought up for consideration under 22 (a) and it surely could not be held here that there should be a reversal under any rule to the effect that in exceptional cases there may be a re-

versal by review in court of a decision upon a point or question not pressed or passed upon below, especially in view of the more recent decision of *Helvering* v. *Wood*, 309 U. S. 344, 60 S. Ct. 551. We submit that this question clearly calls for a review here, in view of the statement of the Circuit Court of Appeals to the effect that it is not free from doubt: "The question of the right of this Court to reverse the Board, which decided correctly the only questions expressly presented to it, is not free from doubt" (R. 48).

Point II.

In event the above point should be decided adversely, no provision of the Revenue Act of 1934 justifies a tax on the income here before the court under 22 (a) or otherwise.

As we have set forth in the point above, we contend that this case does not involve the questions of taxability of income of these trusts under 22 (a). However, if it could be considered, we believe Commissioner's application here would fail. It seems very clear that here there is a misapplication of the rule set forth in *Helvering* v. *Clifford*, 309 U. S. 331, as there are many distinguishing features between the case here before the court and *Helvering* v. *Clifford*, *supra*.

The courts have recognized under a general concept of income that the grantor may be the owner in substance of the income of a trust by virtue of his unfettered command of the corpus or income and the use of the income by the grantor to satisfy his legal obligations. At no point before the Board of Tax Appeals was this contended for, as is shown by the findings of the Board (R. 16 and R. 18), nor did the Commissioner at any time before the Board press the fact that the trusts were lacking in substance (R. 18). Here the grantor and another were co-trustees. The general rule applicable to trustees is not the same as in the case

of executors. They are not usually concerned with the administration of the estate of the deceased. They must act jointly in dealing with the trust estate. In the case of a private trust, as distinguished from a public or charitable trust, where there are several trustees and all have accepted or are exercising the office, their powers, interest and authority are equal and undivided. They cannot act separately, but must act as a unit, except where authorization to act is given to a majority of trustees by statute or by the instrument creating the trust, or except possibly in the case of an urgent emergency. It is generally held that where trustees cannot agree, the court has no power to interfere and direct voting. This would limit power and command of the grantor. See *Scott on Trusts,* paragraph 193.1:

> "Where there are several trustees they must all join in voting the stock or in giving a proxy to one of their number or to a third person. If the trustees do not concur in voting, the shares cannot be voted." 107 Mscl. 443—177 N. Y. S. 757, 256 N. Y. S. 495.

Paragraph 194:

> "Where there are two or more trustees, it is essential that they all concur in the exercise of the powers conferred upon them."

See *Winslow* v. *Baltimore,* 23 S. Ct. 443, 188 U. S. 646, which requires signatures of all trustees, and also *Morville, Jr.* v. *Fowle,* 10 N. E. 766, 768 (Mass.). See *Perry on Trusts and Trustees,* 7th Edition, paragraphs 411 and 412.

In each of the acts hereinafter covered, it is apparent that it would require joint action by the co-trustees and in event one of the trustees refuses to act, the only way that the other can act is on application to the court. See *American Law Institute on Trusts,* paragraph 194:

> "If there are two or more trustees, action by all of them is necessary to the exercise of the powers con-

ferred upon them as trustees. If one of them refuses to concur in the exercise of a power, the others cannot exercise the power. In such a case, however, if it appears to be for the best interest of the trust that there should be an exercise of the power, the court may on application of a co-trustee or beneficiary direct its exercise."

Both the *Clifford* and the instant case provided for the trustees voting the shares of stock, but here both trustees must vote. The trust in the *Clifford* case authorized the sale, exchange, mortgage, or pledge on such terms and considerations in the absolute discretion of the grantor of the trust. No such powers were granted in the *Hormel* case, which was a further limit of command.

In the case here before the court, stock described in the trust was transferred to the co-trustees. It is a general rule that where certain property is conveyed to the trustees, such property shall not be sold, but be retained in specie. See *American Law Institute on Trusts,* paragraph 190 (e), page 505:

"The specific mention of certain property in the will or other instrument by which the trust is declared, particularly where such property comprises the whole of the trust property, is an indication of an intention that the property should not be sold but should be retained in specie. This is true even though the particular property is unproductive."

This rule is subject to the restriction that the court will direct or permit the trustees to deviate. *American Law Institute on Trusts,* paragraph 167. It should be noted here that the trust provided:

"He hereby agrees that said co-trustees shall receive and hold said securities and collect the dividends therefrom as a trust estate in trust for Germaine D. Hormel, as guardian of Thomas D. Hormel, and Jay C. Hormel,

as sole beneficiaries, upon the terms and conditions following:'' (R. 32-33).

Here the power of trustees was to ''receive and hold'' and ''pay out income'' (R. 32-33) and would have no further power. See *Duncan* v. *Jaudon,* 15 Wall. 165-177, U. S. Sup. Ct. Reports, Book 21, L. C. P. 142. See also, *Bremer* v. *Hadley et al.,* 81 N. E. 961, and *Geyser-Marion Gold-Min. Co.* v. *Stark,* C. C. A. Eighth Circuit, 106 Fed. 558. The power of the co-trustees here to sell would be subject to court order. The *Clifford* case further provided the trustees had power to invest and reinvest without restriction. No such powers were in the *Hormel* case. The *Clifford* case authorized power of compromise. No such power is in the *Hormel* case. The *Clifford* case authorized the holding of stock in the trustee's name as an individual. No such power is in the *Hormel* case. The *Clifford* case authorized accumulation of income. The *Hormel* case required the payment to the beneficiary of the income on receipt (R. 33). In *Mertz* v. *Guaranty Trust,* 247 U. S. 137, 159 N. E. 888, a case involving a trust made ''to hold the shares and pay the dividends'' to his daughter, the trustee was without authority to invest in shares of a business corporation or even to continue such an investment made by another unless authority to do so was conferred by the creator of the trust, and that the trust conferred authority and imposed a duty to continue the investment in the shares of a specific corporation, which is similar to the *Hormel* case.

In *Hood* v. *Cannon* (S. C.) 182 S. E. 306, in a case involving the recovery of an assessment on a stock from the trustee, the trust provided: ''To hold the said estate and pay over the said income as herein directed.'' The court stated: ''The will of J. H. Sloan, as has already been stated, did not contain any provision which would authorize a change of investment, but, on the contrary, merely provided that the

trustee should hold the estate and pay over the income to the beneficiaries."

It has been held that where no power is given to the trustee to change the investment, it is supposed to be clear that if the trustee disposed of stock and invested the money in other securities, the trustee would be decreed to replace the stock. *Johns* v. *Herbert,* (1894) 2 Court of Appeals, District of Columbia, 485. The courts do not approve change in investments unless express power is given in the instrument. *Perry on Trusts and Trustees,* 7th Edition, paragraph 459:

> "The Courts do not approve of changes in investments, unless express power is given in the instrument of trust; as where a testator gave certain stocks in trust without direction to vary the security, and the trustee disposed of the stocks and invested the money in other security, he ws ordered to replace the entire sum in the same stocks, although the number of shares were increased by the change."

As to the intimacy of the family's relationship and the retained substance of full enjoyment of rights, there is a marked difference in the *Hormel* and the *Clifford* cases. The income in the *Clifford* case was subject to disposition by Mrs. Clifford. In the *Hormel* case, the income of a minor child can only be used by the guardian as deemed reasonable by the Court. *Section* 8935, *Mason's Minnesota Statutes,* 1927, *Vol.* 2 *page* 1761:

> "Whenever a minor child of a living parent has property sufficient for his maintenance and education in a manner more expensive than such parent can reasonably afford, under all the circumstances, the expenses of the education and maintenance of such minor may be defrayed out of his own property, in whole or in part, as shall be deemed reasonable by the court."

which was amended March 29, 1935, by Laws of 1935 Minn., Chap. 72, paragraph 135, effective July 1, 1935:

> "Guardian's Duties.—A guardian shall be subject to the control and direction of the court at all times and in all things. A general guardian of the person shall have charge of the person of the ward. A general guardian of the estate shall (1) pay the reasonable charges for the support, maintenance, and education of the ward in a manner suitable to his station in life and the value of his estate; but nothing herein contained shall release parents from obligations imposed by law for the support, maintenance, and education of their children."

Surely, the wife and this husband must both be unable to support minor before income could be used and here both had substantial incomes (R. 11 and 15). In event the income was disposed of, the guardian would be accountable to such minor child. From the opinion in the *Clifford* case, it will be seen that there the Court found that there was not substantial change in control. The control over the investment remained and control over the income remained, and that, since the income was in the wife, the husband had assurance that the trust would not in any way substantially change his economic position, and that where the benefits flow to him through the wife, added to the legal rights, he retained, the aggregate may be said to be equivalent to what he previously had. None of those rights of control or income were in the grantor here before the Court. To find here that this income is subject to tax would be in effect to find that a trust could not be created for accumulation for the benefit of a minor child and paid to him at some future time upon his maturity, which has been generally accepted and recognized. See *Boeing* v. *Commissioner,* 37 B. T. A. 178, acquiesced in by the Commissioner,

June 26, 1939; and *John Edward Rovensky* v. *Commissioner*, 37 B. T. A. 702.

In general, it has been held that control by the grantor over the subject matter of taxation and benefits of the subject matter of income taxation, are necessary to impose a tax. See *The Taxable Status of Term Trusts* in *Taxes—The Tax Magazine*, for December, 1939, page 710:

> "Congress and the Courts have set forth as the fundamental concepts 'control' by the grantor over the subject matter of taxation, and 'benefits' of the subject matter of income taxation. In the application of the general rule that a trust may be without substance, the Court has applied the fundamental concepts of 'control' and 'benefit' in reaching its determination. The theory of ownership in substance of the corpus of a trust, it would seem, has no standing unless it rests firmly upon either or both of two fundamental concepts of the subjects of income taxation. There must be something equivalent to ownership,—there must be a privilege or benefit in order to impose the burden."

Point III.

In event taxpayer is held to be subject to taxation under Section 22 (a), such a finding would be unconstitutional construction to place on the law.

Taxpayer submits that in view of the showing heretofore, the income from the trusts cannot possibly accrue to his benefit or be turned to him and that a tax law so broad as to tax him upon the income of another would be depriving him of his property without due process of law and without just compensation. *Harvard Law Review*, June, 1940, page 1341:

> "Moreover, constitutional difficulties may arise, since grantor may assert that taxing him on income which is being distributed to some one else, or which he himself may not receive for a long time, or, indeed, may never

> receive, is taxing him upon the income of another and this constitutes a violation of the due process clause."

Hoeper v. *Tax Commission of Wisconsin,* 284 U. S. 206; *Schlesinger* v. *Wisconsin,* 270 U. S. 230. In the *Hoeper* case, on page 215, the court quoted from another Supreme Court case, *Knowlton* v. *Moore,* 174 U. S. 41, regarding powers of Congress:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The income from that property during that period was the grantee's income, not the taxpayer's income, as it was subject to the unfettered command of the grantees, not subject to any power over it exercisable by the grantor, the source of it being a property interest or estate irrevocably vested in the grantees. *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Nichols* v. *Coolidge,* 274 U. S. 531; *Corliss* v. *Bowers,* 281 U. S. 376; *Poe* v. *Sanborn,* 282 U. S. 101, 116; *Langley* v. *Commissioner,* 61 F. (2) 796; *Bing* v. *Bowers,* 22 F. (2) 450. The income in question was not taxable to taxpayer because he did not own that income, or have any beneficial interest therein when it accrued, and did not have the power, either alone or in conjunction with any person, to revest in himself the title to the property interest or estate which was the source of that income. The thing granted being the estate or property interest which produced the income in question, not future income earned by

the grantor or produced by property which he continued to own, rulings such as those made in the cases of *Lucas* v. *Earl*, 281 U. S. 111, and *Burnet* v. *Leininger*, 285 U. S. 136, are not applicable.

Conclusion.

For reasons stated, your petitioner respectfully prays that a writ of certiorari issue to enable this Court to review the judgment of the Circuit Court of Appeals in this case.

Dated July 17, 1940.

JAY C. HORMEL,
By R. C. ALDERSON,
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APPENDIX.

Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C. A., Title 26, Sec. 22):

SEC. 22. Gross Income.

(a) General Definition.—"Gross Income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Constitution of the United States, Article V of the Amendments (U. S. C. A. Constitution, Part 1, page 39):

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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